CITATION: Hi-Rise Capital Ltd. and Adelaide Street Lofts Inc. (Re), 2021 ONSC 3611
COURT FILE NO.: CV-19-616261-00CL
DATE: 20210518

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 60 OF THE *TRUSTEE ACT*, R.S.O. 1990, c. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO *RULES OF CIVIL PROCEDURE*, R.R.O. 1990, REG. 194, AS AMENDED

RE: IN THE MATTER OF HI-RISE CAPITAL LTD. and IN THE MATTER OF ADELAIDE STREET LOFTS INC.

BEFORE: S.F. Dunphy J.

COUNSEL: *Anu Koshal and Rachel Chan*, for the Applicant, 263 Holdings

Inc. Greg Azeff and *Stephanie De Caria*, court appointed for the Investors

HEARD at Toronto: May 13, 2021

REASONS FOR DECISION

[1] This issue on this motion is the interpretation of Minutes of Settlement arrived at following a judicial mediation conducted in the Commercial Court. The question to be resolved is which of the parties ought to bear the responsibility for property taxes accruing on a distressed property until it was sold in the course of the proceeding having regard to the terms of the Minutes of Settlement.

[2] This dispute arises out of the financing of a condominium project at 263 Adelaide Street West in Toronto. Three related parties were involved in this development: Hi-Rise Capital Ltd, Adelaide Street Lofts Inc. and 263 Holdings Inc. The moving party 263 Holdings seeks the release from escrow of funds received by its counsel on closing of the sale transaction contemplated by the Minutes of Settlement. The responding party Representative Counsel, acting on behalf of the Investors (referenced below), seeks to have those funds directed to it for the distribution to the Investors.

[3] For the reasons that follow I find in favour of the moving party 263 Holdings and order the funds held in escrow in respect of this dispute to be released to it forthwith. The plain wording of the Minutes of Settlement obliged Adelaide to pay only the current expenses in relation to the project that it was then paying. Property taxes had been accruing unpaid on the property from the beginning of this proceeding - a fact that was plainly disclosed to all parties including Representative Counsel and Investors on multiple occasions prior to the Minutes of Settlement being negotiated and approved. There is neither unfairness nor absurdity arising from holding the parties to the bargain they struck.

Background facts

[4] Adelaide is a wholly-owned subsidiary of 263 Holdings. Adelaide was the registered owner of the property in question and the mortgagor of a syndicated mortgage arranged by Hi-Rise. Hi-Rise acted as the mortgage broker who arranged for a syndicated mortgage in the amount of $60 million and acted as administrator and trustee for the Investors in the syndicated mortgage. 263 Holdings was also one of the Investors in the syndicated mortgage administered by Hi-Rise.

[5] Meridian Credit Union Limited held a first mortgage on the subject property with approximately $16 million outstanding.

[6] The syndicated mortgage structure used to finance this project ran into difficulties in 2017 when a different syndicated mortgage vehicle got into financial difficulty and engendered significant investor losses. Following this, the market for the construction financing needed to complete this project effectively evaporated leaving the Adelaide project without access to the financing needed to complete it. Lacking access to the funding needed to bring the project to completion, the decision was made to sell the property with a view to raising as much funds as possible to repay the syndicated mortgage.

[7] On March 21, 2019, Hi-Rise brought this application to seek the appointment of representative counsel on behalf of the group of investors in the syndicated mortgage (just under 700 in number) to consider a potential transaction involving the property and to provide a process to enable the syndicated mortgage to be discharged in connection with such a transaction that was not expected to retire the syndicated mortgage in full. Miller Thomson was appointed representative counsel for the investors in the syndicated mortgage.

[8] The details of the transaction then being considered are of only peripheral relevance to this motion. Lanterra Developments Ltd. would have been involved in that transaction as would parties related to Adelaide.

[9] Between March 21, 2019 and November 27, 2019, the following events occurred:

a. An “Official Committee” was formed to instruct representative counsel and approved by the Court on April 15, 2019;

b. Meridian issued a demand on its first mortgage on June 14, 2019;

c. Representative counsel requested and the court ordered the appointment of an Information Officer (Alvarez & Marsal Canada Inc.) on September 17, 2019 to examine all relevant information in relation to the transaction then being proposed;

d. On September 27, 2019, Meridian commenced a Notice of Application seeking the appointment of a receiver over the subject property;

e. The Information Officer prepared a detailed report and financial analysis of the proposed transaction on October 7, 2019. The Information Officer's report contained pro forma estimates of investor recoveries under the proposed transaction or under a possible receivership scenario both of which indicated that the investors were not likely to recover all of their investment in either case;

f. In its Third Report to the Court dated October 18, 2019, Miller Thomson reported the recommendation of the Official Committee against approval of the proposed transaction;

g. On October 23, 2019, the investors rejected the proposed transaction; and

h. On November 1, 2019, Meridian's receivership application was adjourned to December 1, 2019 and a judicial mediation was scheduled to take place on November 27, 2019.

[10] The mediation process was successful and the Minutes of Settlement the interpretation of which lies at the core of this motion was entered into and signed by the parties on December 20, 2019. Meridian's receivership application was adjourned *sine die*. Representative Counsel delivered its Fourth Report regarding the newly-proposed transaction on January 9, 2020 and the Investors voted to approve it on January 31, 2020, court approval being obtained on April 27, 2020.

[11] I shall refer to some of the terms of those Minutes of Settlement below. Paragraph 21 of the Minutes of Settlement referred any dispute arising from the Minutes to this court and the parties thereto attorned to the jurisdiction of the court for that purpose.

[12] At a high level, the Minutes of Settlement contemplated a sale of the project to Lanterra for $69 million and provided for an agreed upon waterfall of distribution of the proceeds of that sale. Unlike the prior transaction in which affiliates of Adelaide would have remained involved as investors in the project, Lanterra would be purchasing the project in its own right. The agreed waterfall of payments required (i) payment in full of the Meridian mortgage, (ii) payment of certain amounts advanced by Lanterra prior to closing (related to the Merdian mortgage) and a portion of the agreed brokerage fee to be paid to Bank of Montreal; (iii) payment to 263 Holdings of the fixed amount of $3,734,000; and (iv) payment to Miller Thomson in trust for the investors of the balance of the Purchase Price. 263 Holdings is also one of the Investors in the syndicated mortgage. Under the Minutes of Settlement, 263 Holdings would forego any distributions in its capacity as Investor.

[13] The remainder of the chronology needed to place this application in some context can be quickly summarized. The Minutes of Settlement were ultimately approved by the Investors on January 31, 2020 and, on March 19, 2020, by the Court. The unanticipated intervention of the pandemic necessitated a delay in the closing of the transaction from April 2020 until November 2020. That delay was approved by the court although it is of some relevance that 263 Holdings and Adelaide opposed the delay. The process of

distributing all of the proceeds of the sale to the investors continues and is only partly impacted by this motion.

[14] Closing was scheduled for November 16, 2020. That day, representative counsel wrote to counsel for 263 Holdings and Adelaide demanding that the sum of $914,793.40 be remitted to representative counsel as soon as received by 263 Holdings from the closing proceeds in accordance with the Minutes. The amount in question represented the amount of property tax arrears that were paid by Lanterrra from the closing funds and which representative counsel took the position ought to have been paid by Adelaide as owner of the property up until the time of closing. Counsel for 263 Holdings continues to hold the disputed amount of funds in trust pending the outcome of this motion.

[15] The following facts pertain more particularly to the issue of the property tax arrears the status of which is the central issue before me:

a. On May 29, 2019, Mr. Neilas (the principal of 263 Holdings) sent representative counsel a copy of a May 16, 2019 letter from Meridian to Adelaide outlining Meridian's concerns regarding, among other things, "property taxes are currently $65,086 in arrears and are not purported to be brought current until a sale of 263 Adelaide Street West, Toronto transpires". The email requested a call on this subject "it's somewhat urgent".

b. On June 19, 2019 Mr. Neilas forwarded the demand letter from Meridian dated June 14, 2019 which letter noted, among other events of default, the debtor's "failure to keep the Property's taxes current with the result that arrears have accrued in the amount of $65,086.00".

c. The August 30, 2019 report of Grant Thornton, Hi-Rise Capital's financial advisor on the first proposed transaction, which report estimated recoveries to investors *after* payment of $280,437 in outstanding taxes to the City of Toronto and noted in relation to alternative transactions the requirement to take into account "arrears outstanding and accrued as of October 16, 2019 plus the requisite number of months … of future taxes". The report was prepared for filing in court and for review by investors for the purpose of considering their vote on the proposed transaction. Hi-Rise Capital circulated the report to investors in the syndicated mortgage on September 3, 2019.

d. The September 27, 2019 Notice of Application of Meridian seeking the appointment of a receiver listed as one of the grounds of its application the fact that "one or more defaults has also occurred under the Credit Agreement, including, without limitation, the Debtor having failed to pay property taxes arising in respect of the Real Property and having failed to pay interest installments due thereunder which default has continued into the present".

e. The Information Officer's report dated October 7, 2020 contains specific references to the issue of accruing property taxes which would be paid prior to the investors and reduce the amount available for distribution to them. All estimates of potential distributions to Investors either pursuant to the proposed transaction or pursuant to a receivership were net of accruing property taxes.

f. On October 18, 2019, Representative Counsel delivered its Third Report commenting upon the report of the Information Officer regarding potential returns to Investors and reporting on the recommendation of the Official Committee against approval of the transaction as it was then being proposed.

g. On October 20, 2019, the Investors voted against the proposed transaction and two days later Meridian served its Notice of Application.

h. Following negotiation of the Minutes of Settlement, Representative Counsel delivered its Fourth Report to Investors dated January 9, 2020. This report was timed to precede the January 31, 2020 vote by Investors upon the proposal contemplated by the Minutes of Settlement. While no express mention of the subject of property taxes was made, the Fourth Report affirmed the facts contained in the Information Officer's prior report, specifically noted the fixed sum of $3,784,000 to be paid to parties related to the principal of Adelaide and 263 Holdings and recommended approval of the transaction contemplated by the Minutes of Settlement.

[16] At closing, Lanterra remitted the Purchase Price in accordance with the Minutes of Settlement having deducted as a credit against the purchase price the sum of $914,793.40 in respect of accrued by unpaid municipal property taxes. In light of the dispute arising between 263 Holdings and Representative Counsel, that sum was retained by 263 Holdings' counsel in trust pending the outcome of this motion.

Issues to be decided

[17] The parties are in fundamental disagreement regarding the interpretation of paragraph 4 of the Minutes of Settlement. That paragraph reads in full as follows:

> Until the Closing Date, Adelaide shall (a) continue to operate the Property on the same basis as at the date of execution of these Minutes of Settlement; (b) continue to pay the operating expenses in respect of the Property that it is paying as at the date of execution of these Minutes of Settlement, and will not be liable or responsible for any other expenses in respect of the Property; and (c) pay all remittances on account of harmonized sales tax or HST.

[18] The moving parties' position is that property taxes not having been paid by Adelaide since the commencement of the proceedings leading the Minutes of Settlement, the obligation of Adelaide to operate the property "on the same basis as at the date of

execution" and to "continue to pay the operating expenses in respect of the Property that it is paying as at the date of execution" of the Minutes of Settlement excludes the payment of accruing municipal property taxes up until the time of closing since these were not then being paid and the *status quo* as regards operations was to be preserved until closing. They contrast this to the provisions of paragraph 4(c) which require the payment of all HST accruing.

[19] The responding party Representative Counsel takes the position that all ordinary course operating expenses were required to be paid until closing pursuant to the Minutes of Settlement and that the reference to "is paying as at the date of execution" was intended only to make clear that no new operating expenses were required to be incurred. To hold otherwise, they submit, would mean that all accounts payable outstanding as of the date of the Minutes of Settlement need not have been paid – a number not in the contemplation of the parties and leading to an absurd result. The reference to HST in paragraph 4(c) is of no assistance since that amount was a pure pass-through of what are effectively trust amounts paid by third parties and collected by Adelaide on behalf of the Crown.

[20] The issue to be decided is thus whether outstanding municipal property taxes as at the date of the Minutes of Settlement and accruing thereafter until the closing were required to be paid by Adelaide pursuant to paragraph 4 of the Minutes of Settlement or whether such sum ought properly to reduce the balance of the purchase price payable for the benefit of Investors pursuant to s., 9 of the Minutes of Settlement.

Analysis and discussion

[21] This is a dispute regarding the interpretation of a contract. There was no dispute between the parties regarding the applicable principles of interpretation to be applied here. A summary of these principles that I found useful in the context of this dispute is the following passage from *Salah v. Timothy's Coffees of the World Inc*., 2010 ONCA 673 (CanLII) where Winkler C.J.O. found (at para. 16):

> The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity.

[22] I have set forth a reasonably detailed summary of the factual matrix giving rise to the agreement reflected in the Minutes of Settlement. The record filed by the parties is a rather voluminous one as is not at all uncommon in commercial contracts of this nature

In summarizing the factual matrix, however, one must be ever cautious of losing sight of the proverbial forest for the trees. The discernment of the intention of the parties the language actually used by them is the object of the exercise. The factual matrix is examined to understand the meaning of the language the parties chose to employ and not to find a reason to deviate from that language. This is the error the Supreme Court of Canada warned against in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 SCR 633 at para. 57.

[23] This is not a case where the doctrine of *contra proferentem* has any application. The agreement is the product of a commercial negotiation among sophisticated parties with access to as much legal advice as the many millions of dollars at stake made available to them all. The interests of the Investors were represented by a court-approved Official Committee instructing Representative Counsel. The only compulsion existing in the process was the result of the commercial pressures inherent in the situation. The process was undertaken in the context of a judicially-supervised mediation.

[24] I start then by examining the language the parties used in their agreement and assume that the words they used were chosen intentionally by them and are neither to be read down nor read out of the agreement. I examine the language in s. 4 of the Minutes – being the disputed portion of the agreement – but I do so in the context of the agreement as a whole.

[25] Paragraph 4 of the Minutes of Settlement contains three sub-clauses each of which contributes to the process of establishing the intent of the parties from the language used:

a. Adelaide as owner of the property was instructed to “continue” to operate the property. It had been operating the property up until this point even if the pending receivership application threatened to displace it. The parties could have but did not require Adelaide to operate until closing in accordance with “good commercial practice” or by reference to some other generally applicable external standard. Rather, the language the parties chose to employ qualified the obligation. Adelaide agreed to *continue* to operate the property “as at the date of execution of these Minutes of Settlement”.

b. The very same concept of continuity with existing practice was carried forward in section 4(b) of the Minutes: Adelaide was instructed to *continue* to pay operating expenses “that it is paying as at the date of execution” of the Minutes. The parties did not simply instruct Adelaide to pay operating expenses – they qualified the obligation to pay by the word “continue” and the words “that it is paying as at the date of execution” of the agreement. The obligation was not to pay *all* operating expenses but only to pay that subset of operating expenses that it was then paying.

c. By contrast, paragraph (c) contains an entirely unqualified obligation to pay *all* remittances of HST. This obligation was without qualification.

[26] Paragraphs (a) and (b) of s. 4 were both explicitly qualified by reference to a known standard being the *status quo* as it existed at the time the agreement was executed. There can be no question that the *status quo* as at that time – and indeed for all or substantially all of 2019 – had been the deferral of municipal property taxes while some kind of restructuring transaction was being negotiated. If, as the respondent suggests, operating expenses accruing in accordance with GAAP or some other external benchmark were intended to be paid, words that qualified the obligation by reference to existing practices would have been entirely unnecessary and indeed counter-productive. I am obliged to give meaning to all of the words the parties chose to employ. Those words were plainly and obviously qualified by reference to the practice existing at the time of the agreement itself and that practice was plainly to defer payment of property taxes.

[27] I do not agree with the respondent's suggestion that this interpretation would lead to the absurd result of excusing Adelaide from paying every single creditor appearing on the accounts payable ledger as at the date of execution of the Minutes of Settlement even if they had otherwise been paid in the usual course before that time. In so arguing, the respondent is setting up a straw man. The agreement does not reference "accounts payable" (which would indeed be a snapshot in time) when describing what Adelaide must pay but instead refers to those payments Adelaide was paying at the time. Whether there were any *other* operating expenses not being paid as at the date of execution of the agreement I cannot say. However, it is clear that this particular operating expense was not being paid and had not been paid for a period of many months. The practice of Adelaide not paying property taxes while the restructuring exercise was on-going was by then well established and frequently reported upon in various court filings.

[28] The parties had good reason to single out HST as a tax that required special treatment. Collected but unremitted HST gives rise to a host of collection tools in favour of the Crown that had the potential to disrupt the waterfall of payments mechanisms so carefully constructed by the Minutes of Settlement. The amount is variable and self-reported (in this case by Adelaide). Property tax, on the other hand, is an adjustment that is normally made at closing in real estate transactions by way of credit against the purchase price as was indeed done here. The amount is easily verifiable and can be accrued by the day quite simply.

[29] Next, I zoom out as it were from a close examination of the language of the agreement itself to a consideration of the broader factual matrix in which it is found. I examine the broader factual matrix to consider whether there are indicators of intention that may add a gloss or nuance to the words used by the parties but not to replace those words with different ones. Does one or the other interpretation contended for appear unreasonable or even absurd in light of the broader context? Is there a plausible interpretation that appears more consistent with the indicia of intent derived from a consideration of the broader context?

[30] While I am describing the interpretation process as a sequential process, reality is quite different. Language can never be considered entirely divorced from context. The factual matrix and commercial context (in the case of a commercial agreement such as this) are all necessarily part of the interpretation process from the beginning to the middle to the end. It is helpful to dissect the process of analysis both to ensure rigour in the interpretation process and as a reality check.

[31] Having concluded that the language of s. 4 of the Settlement Agreement favours the moving party giving such language its plain and ordinary meaning, I look first to the rest of the agreement and then to the broader commercial context to see how that initial "plain meaning" interpretation stands up.

[32] Other aspects of the Minutes of Settlement support the interpretation that a plain reading of s. 4 implies.

[33] Section 3 (a) of the Minutes required Adelaide and Lanterra to enter into a purchase agreement containing minimum representations and warranties customary in receivership sales and subject to closing conditions customary in receivership sales. Deferring property tax to be paid out of closing proceeds is indeed a normal and customary provision in a receivership sale where operating credit is often unavailable or if available is scarce, expensive and subject to a court approval process. Property taxes are already secured by the land by operation of law. Sections 3(b) and (c) of the Minutes made specific provision for Lanterra to loan funds to Adelaide that were needed to maintain the Merdian loan in place until closing. No such arrangements were made in respect of property taxes beyond the provisions for customary closing adjustments. All of these arrangements were quite consistent with a common objective intention that property taxes were to continue to be deferred as they had been that year and paid as an adjustment at closing.

[34] There is no evidence that Adelaide had the funds on hand necessary to pay almost $1 million in accruing property taxes up until the time of closing even if a significant portion of that amount arose as a result of the unanticipated delay in closing due to the pandemic. The evidence does indicate that Adelaide continued to collect rent and pay its operating expenses other than property tax but there is no evidence that this latter number could have been paid along the other expenses being funded. There was no arrangement to provide Adelaide with external funding to bring that deferred amount current whereas funding was specifically arranged to keep Meridian current.

[35] The respondents suggest that Adelaide was remitting funds to 263 Holdings that it ought instead to have used to pay property taxes. There is no evidence that any money was transferred to 263 Holdings that it was not legally entitled to receive. There is no evidence, for example, of any dividends being paid to 263 Holdings. I cannot infer anything from the continuation of ordinary course payments to 263 Holdings after the execution of the Minutes of Settlement beyond the fact that the Minutes of Settlement specifically contemplated Adelaide continuing to operate in accordance with its then practices both as to operations and payments.

[36] In terms of the overall context of the Minutes of Settlement, it is to be recalled that all parties agreed that 263 Holdings was to receive a fixed sum of money from the closing which is exactly what it did receive. Whether the fixed sum to 263 Holdings represented compensation for giving up its right to distributions as an Investor, compensation for continuing to maintain *status quo* operations while avoiding the expense of a receivership, compensation for some other loss or a combination of all of these things, the fact of the matter is that all parties agreed that 263 Holdings would receive that fixed sum, no more and no less. The Investors were always to receive the residue *after* all of the other listed payments were made.

[37] Zooming out further, there is nothing in the broader commercial context that renders the outcome suggested by an ordinary reading of the plain language used by the parties absurd or even unusual.

[38] The original restructuring proposal had some potential upside for the property owner in the form of a joint venture with Lanterra. That potential upside for equity died when the proposal was voted down by the Investors. By staying in place and managing the property, Adelaide and 263 Holdings enabled the Investors to avoid the spectre of a potentially expensive receivership the cost of which would have reduced the net proceeds of realization. I am not suggesting nominating 263 Holdings or Adelaide for an altruism award. I merely note that their interest going forward was quite constrained and was the product of close negotiation. I have no evidence as to what amount of net operating income may have been available to pay management or similar fees to the owners during this time period. I infer from the commercial circumstances only that any amount that may have been left to pay such fees was judged by the parties to be a lesser evil than the risk of paying all of the costs associated with achieving a sale of the same property in a receivership.

[39] In this context, the decision of the parties to maintain the existing practice of deferring property taxes until the sale of the property was completed appears both reasonable and indeed normal. The purchase agreement with Lanterra contemplated by s. 3(a) and (b) of the Minutes of Settlement was intentionally modelled after a receivership sale and payment of property taxes out of closing proceeds would have been entirely in keeping with that model.

[40] While I have no reason to doubt that Representative Counsel did not in fact consider the question of accruing property taxes at the time it advised the Official Committee regarding the Minutes of Settlement and obtained court approval of them, a party's subjective belief is not the principle that guides interpretation. Property tax was an issue that was hiding in plain sight. Every assessment of the range of possible Investor outcomes made it plain that such taxes were unpaid, continuing to grow and would ultimately have to be paid from transaction proceeds ahead of Investors.

[41] I conclude that s. 4 of the Minutes of Settlement did not require Adelaide to pay outstanding or accruing property taxes because it was not paying such property taxes at the time the Minutes of Settlement were executed or for many months before that time. This fact was something that all parties to the Minutes of Settlement either knew or ought to have known in the circumstances. The language used by the parties compels this result

in clear and unambiguous terms and the result is consistent with the commercial common sense considering the context in which the Minutes of Settlement were entered into.

Disposition

[42] Accordingly, I find in favour of the moving party and order:

a. that, as between the parties to the Minutes of Settlement, neither 263 Holdings nor Adelaide was required to pay $914,743.40 in municipal tax arrears owing on the subject property at the time of the closing of the sale thereof;

b. that the $914,743.40 in proceeds from the sale of the property that is currently held in trust be forthwith released to 263 Holdings

c. the moving party is entitled to its costs of this motion to be determined pursuant to the procedure set forth below.

[43] I requested the parties to exchange their outlines of costs with each other at the close of the hearing and, if possible, to arrive a common figure for costs (to be paid or received depending on the outcome). While I am advised that no agreement emerged from their discussions, I assume outlines of costs have been exchanged such that each is at least somewhat aware of the expectations of the other in terms of costs. The following procedure shall be followed:

a. 263 Holdings is to deliver its submissions regarding the amount and scale of costs to Representative Counsel by May 25, 2021;

b. Representative Counsel shall respond by June 1, 2021; and

c. 263 Holdings may reply by June 4,2021.

d. Submissions shall be restricted to seven pages each exclusive of outline of costs, any relevant offers to settle or cases. Reply shall be restricted to three pages and shall be TRUE reply only and only if necessary (it seldom is). Cases may be referred to by hyperlinked citations if desired. Counsel for 263 Holdings shall be responsible for conveying all of the submissions from both sides by email through my assistant, copying Representative Counsel when doing so.

S.F. Dunphy J.

Date: May 18, 2021